

**CALIFORNIA ENERGY COMMISSION**1516 NINTH STREET  
SACRAMENTO, CA 95814-5512

**STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

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| <b>Implementation of Restructuring</b>    | ) | <b>Docket No. 98-REN-New</b>                 |
| <b>Legislation (Public Utilities Code</b> | ) | <b>Notice of Business Meeting</b>            |
| <b>Sections 381, 383.5 and 445</b>        | ) | <b>RE: Petition by NEO Corporation</b>       |
| <b>[AB 1890, SB 90]): Renewables</b>      | ) | <b>Petition by Cabazon Wind Partners LLC</b> |
|   | ) | <b>New Renewable Resources Account</b>       |

**NOTICE OF RECOMMENDED COMMITTEE DECISION  
REGARDING NEO CORPORATION AND CABAZON WIND PARTNERS LLC  
PETITIONS FOR EXTENSION OF FUNDING AWARDS**

The Energy Commission's Business Meeting will be held:

**WEDNESDAY, July 17, 2002**

10 a.m.

CALIFORNIA ENERGY COMMISSION

1516 Ninth Street

Hearing Room A

Sacramento, California

(Wheelchair Accessible)

As part of its regularly scheduled Business Meeting on July 17, 2002, the Energy Commission will consider proposed recommendations by the Commission's Environmental and Energy Infrastructure and Licensing Committee (Committee) regarding petitions to extend funding awards under the New Renewable Resources Account, pursuant to Public Utilities Code Section 383.5(c)(2)(B), by: (1) NEO Corporation, to extend the funding awards for its Milliken Landfill Gas Utilization Project, Colton Landfill Gas Utilization Project, and Mid-Valley Landfill Gas Utilization Project, and (2) Cabazon Wind Partners LLC, to extend the funding award for its Cabazon Wind Project.

The Committee's findings and recommendations with respect to the subject petitions are presented in the enclosed *Environmental and Energy Infrastructure and Licensing Committee Decision on Petition of NEO Corporation* and *Environmental and Energy Infrastructure and Licensing Committee Decision on Petition of Cabazon Wind Partners LLC*.

In summary, the Committee's findings and recommendations are as follows:

1. Based on the petition submitted by NEO Corporation on May 21, 2002, the Committee finds that the Milliken Landfill Gas Utilization Project, the Colton Landfill Gas Utilization Project, and the Mid-Valley Landfill Gas Utilization Project were not operational by January 1, 2002, due to circumstances beyond NEO Corporation's control.

The Committee recommends that the on-line date for purposes of the Commission's funding awards for the Milliken Landfill Gas Utilization Project, the Colton Landfill Gas Utilization Project, and the Mid-Valley Landfill Gas Utilization Project be extended an additional 18 months to July 2, 2003. In addition, the Committee recommends that the awards for these projects be reduced as specified in the Commission's adopted guidelines and that projects receive no funding award payments for any power generated after July 2, 2008. Lastly, the Committee recommends that if the projects are not on-line by July 2, 2003, or by a reasonable period of time thereafter, the Commission reevaluate the status of the projects to determine if additional award reductions or award cancellations are justified.

2. Based on the petition submitted by Cabazon Wind Partners LLC on May 24, 2002, the Committee finds that the Cabazon Wind Project was not operational by January 1, 2002, due to circumstances beyond Cabazon Wind Partners LLC's control.

The Committee recommends that the on-line date for purposes of the Commission's funding award for the Cabazon Wind Project be extended an additional 10 months to November 1, 2002. In addition, the Committee recommends that the project receive no funding award payments for any power generated after October 31, 2007. Lastly, the Committee recommends that if the project is not on-line by November 1, 2002, or by a reasonable period of time thereafter, the Commission reevaluate the status of the project to determine if an additional award reduction or award cancellation is justified.

### **Written Comments**

The Energy Commission encourages members of the public to submit written comments. Twelve copies of any comments filed by mail or in person should be provided to the Commission's Dockets Office. Parties may file electronically but must also submit one paper copy (one-sided please) to the Docket Office. Comments should be sent to:

**California Energy Commission  
Dockets Office  
Attn: Docket REN-98-NEW  
1516 Ninth St., MS-4  
Sacramento, CA 95814-5512  
E-Mail: [docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)**

All written materials filed with the Dockets Office will become part of the public record in this proceeding. To ensure that the full Commission has adequate time to review comments submitted before the July 17, 2002 Business Meeting, comments must be submitted no later than close of business July 14, 2002.

**Assistance**

The Energy Commission's Public Adviser provides assistance to the public regarding Energy Commission procedures and participation in Energy Commission activities. Anyone wishing to obtain information on how to participate in this meeting may reach the Public Adviser's Office by phone at (916) 654-4489, toll free at (800) 822-6228, or by e-mail at [pao@energy.state.ca.us]. If you have a disability and need assistance in order to participate in this hearing, please contact Priscilla Ross at (916) 653-6631. Technical questions regarding the subject matter of this notice may be addressed to Suzanne Korosec at (916) 654-4516, or by e-mail at [skorosec@energy.state.ca.us]. News media should direct inquiries to Assistant Director Claudia Chandler at (916) 654-4989.

Date: June 26, 2002

**STATE OF CALIFORNIA ENERGY  
RESOURCES CONSERVATION AND  
DEVELOPMENT COMMISSION**

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ROBERT PERNELL

Commissioner and Presiding Member  
Environmental and Energy Infrastructure and Licensing Committee

Date Mailed: June 28, 2002  
Mass Mail List: Master63/New

# **Environmental and Energy Infrastructure and Licensing Committee Decision on Petition of NEO Corporation**

## **Program Background**

Assembly Bill 1890 ([AB 1890] enacted September 23, 1996) provides \$540 million for the support of renewable electricity generation technologies. These funds are collected from the ratepayers of the state's investor-owned utilities to support existing, new, and emerging renewable electricity generation technologies.

The Renewable Energy Program was established by Senate Bill 90 ([SB 90] enacted October 12, 1997) to distribute these funds. The program consists of four separate accounts, each addressing differing needs within the renewables industry: the Existing Renewable Resources Account, the New Renewable Resources Account, the Emerging Renewable Resources Account, and the Customer-Side Renewable Resource Purchases Account.

The New Renewable Resources Account was originally allocated 30 percent of the AB 1890 funds, or \$162 million, to provide assistance to renewable electricity generating facilities that become operational after September 26, 1996. These funds are intended to foster the development of new in-state renewable electricity generation facilities and secure for the state the environmental, economic, and reliability benefits that those facilities provide. Funds in the account are awarded through periodic "auctions" in which developers of prospective renewable energy projects compete for funding in the form of production incentives paid out over a maximum of five years.

The California Energy Commission has held three such auctions to date. Detailed rules for the auctions are contained in the *Guidebook for the Renewable Energy Program, Volumes 2A and 2B – New Renewable Resources Account (Guidebook)*, available at [[www.energy.ca.gov/renewables](http://www.energy.ca.gov/renewables)]), as well as in the solicitation document for each of the three auctions, Notice of Auction (NOA) 500-97-506, NOA 500-00-504 and NOA 6-01-3.

To participate in the auctions, developers must submit bids for the amount of incentives that the developers require to compete in the broader electricity market, along with a detailed project description, schedule, and estimate of how much renewable generation the project will provide during the first five years of operation.

The second auction (NOA 500-00-504) was held in October 2000. Eligible bids in the auction were ranked from lowest cents per kilowatt-hour incentive request to highest. Beginning with the lowest request, eligible bids were accepted until funds were fully allocated. Auction winners were notified in writing on December 8, 2001 that their projects had been accepted as eligible for funding.

The second auction was designed specifically to encourage projects to be on-line by the summer of 2001 to help meet the state's anticipated summer peak. Toward that end, winning bidders were subject to bonuses and penalties based on their on-line dates, as shown below:

| <b>Project On-line Date</b>   | <b>Percentage of Award</b>                 |
|-------------------------------|--|
| Prior to or on June 1, 2001   | 110 Percent                                |
| June 2 to July 1, 2001        | 100 Percent                                |
| July 2 to August 1, 2001      | 90 Percent                                 |
| August 2 to December 31, 2001 | 80 Percent                                 |
| January 1, 2002 and beyond    | Award may be terminated or further reduced |

According to the *Guidebook for the Renewable Energy Program - Volume 2, New Renewable Resources Account* and the NOA 500-00-504, winning projects from the second auction must come on-line (begin generating electricity) by December 31, 2001 or sooner to receive five full years of funding from the Energy Commission. This on-line date requirement is based on the version of Public Utilities Code section 383.5(c)(2)(B) existing at the time the Notice of Auction 500-00-504 was developed.

In September of 2000, Governor Davis signed Assembly Bill 995 into law, which amended section 383.5(c)(2)(B) so that projects participating in the New Renewable Resources Account could come on-line later than December 31, 2001 and still receive five full years of funding, provided that the Commission makes a formal finding that the delay in on-line date resulted from circumstances beyond a project developer's control.

At its regularly scheduled April 3, 2002 Business Meeting, the Energy Commission adopted revisions to the program guidelines to incorporate a petition process for winning project developers to follow in applying to the Commission for a funding award extension under this amendment. In summary, petitions must be sent to the Environmental and Energy Infrastructure and Licensing Committee and specify the reasons for the project's delayed on-line date, explain why the petitioner believes the delay resulted from circumstances beyond the petitioner's control, identify the reasonable efforts taken by the petitioner to bring the project on-line by the date specified in the applicable auction solicitation, identify the additional time needed to bring the project on-line and explain why this time is needed, and include a revised project schedule identifying new milestone completion dates for any milestones not passed as of the date of the petition. Within 30 days of receipt of a complete petition the Committee, in its discretion, will either issue a decision based on its consideration of the petition or schedule a hearing to consider the petition. The Committee's decision will contain recommendations regarding the appropriateness of a funding award extension, the length of extension, and any reductions or penalties to be imposed. The Committee's decision and recommendations will become final when formally approved by the Commission at a regularly scheduled Business Meeting.

In addition to the petition process, the revised guidelines established mandatory penalties for winning projects from the second and third auction that were delayed beyond January 1, 2002, as shown below.

| <b>Project On-line Date</b>      | <b>Percentage of Award</b>                  |
|----------------------------------|---|
| January 1 to September 1, 2002   | 80 Percent                                  |
| Sept. 2 to December 31, 2002     | 70 Percent                                  |
| January 1, 2003 to April 1, 2003 | 60 Percent                                  |
| April 2, 2003 to July 1, 2003    | 50 Percent                                  |
| July 2, 2003 and beyond          | Award may be further reduced or terminated. |

## **NEO Projects**

NEO Corporation (“NEO”) was a winning bidder in the second auction (NOA 500-00-504), held in October 2000, with three landfill gas projects: the 5.04 megawatt Milliken Landfill Gas Utilization Project (“Milliken Project”), for which NEO was awarded \$667,636.00; the 2.52 megawatt Colton Landfill Gas Utilization Project (“Colton Project”), for which NEO was awarded \$334,672.79, and the 3.78 megawatt Mid-Valley Landfill Gas Utilization Project (“Mid-Valley Project”, for which NEO was awarded \$471,946.62.

No funding award agreements have been signed with NEO for these three projects as yet, since the Commission does not sign funding award agreements with winners of the second auction until the projects have met their California Environmental Quality Act (CEQA) requirements.

The three NEO projects are located in San Bernardino County and are of similar design. For each project, landfill gas will be used to fuel four single engine-generators sets to produce electricity to generate the project’s own load with the excess exported through the transmission grid. Only the energy exported and sold through the transmission grid is eligible for funding from the New Renewable Resources Account.

At the time of the second auction, NEO submitted project schedules to the Energy Commission showing that their projects would be on-line before January 1, 2002, stating an on-line date for the three projects of May 24, 2001. However, the projects have experienced a series of delays in project development and currently report revised on-line dates of after January 1, 2002.

## **NEO Petition**

NEO submitted a formal petition (“Petition”) to the Energy Commission on November 28, 2001, asking to have the awards for the Colton, Milliken, and Mid-Valley Projects extended pursuant to the amendment of Public Utilities Code section 383.5(c)(2)(B). The petition requested the Energy Commission to make a determination that the three projects would not be operational by January 1, 2002 due to “circumstances beyond the control of the developer.” Since the Commission had not yet adopted guidelines

establishing the petition process for projects to apply for a funding award extension, NEO was informed that the petition would not be reviewed until that process had been formalized.

Shortly before the petition process was adopted on April 3, 2002, NEO contacted Commission staff to inform them that due to the time between submittal of the November 28, 2001 petition and the adoption of the revised program guidelines, there were changes in the status of the three landfill gas projects and that NEO would be submitting a revised petition that incorporated by reference information submitted in the November 28, 2001 petition.

NEO subsequently submitted a revised petition on May 21, 2002. The revised petition seeks a 15-month extension to the on-line date for all three NEO projects to March 31, 2003. Although NEO expects to have the projects on-line by December 31, 2002, it is seeking an extension to March 31, 2003 to address any unexpected delays.

After reviewing the petition and deeming it complete, the Committee determined that there was no need to hold a hearing to address the petition and that it would exercise its discretion to issue a decision based on the petition alone.

## **Discussion**

The discussion that follows will first address the requisite findings under California Public Utilities Code section 383.5(c)(2)(B), then the length of any funding award extensions, and lastly any appropriate reduction or penalty of the projects' awards. Because the circumstances surrounding the Colton, Milliken, and Mid-Valley Projects are nearly identical, the three projects will be considered as a group rather than presenting the findings on a project-by-project basis.

### **A. Findings Under Public Utilities Code Section 383.5(c)(2)(B)**

Under California law, a project awarded funding from the Commission's New Renewable Resources Account remains eligible to receive five years of funding even if the project is not operational by January 1, 2002, if the Commission finds the delayed operation was due to circumstances beyond the project developer's control. This law is set forth in Public Utilities Code section 383.5 (c)(2)(B), which provides as follows:

*"Funds expended for production incentives shall be paid over a five-year period commencing on the date that a project begins electricity production, provided that the project shall be operational prior to January 1, 2002, unless the State Energy Resources Conservation and Development Commission finds that the project will not be operational prior to January 1, 2002, due to circumstances beyond the control of the developer. Upon making this finding, the State Energy Resources Conservation and Development Commission shall pay production incentives over a five-year period, commencing on the date of operation, provided that the date*

that a project begins electricity production may not extend beyond January 1, 2007.” [Emphasis added.]

To make the requisite finding, the Energy Commission must determine if there were circumstances beyond NEO's control that prevented the projects from coming on-line by January 1, 2002.

In the Petition, NEO points to several factors which it claims were beyond its control that delayed the projects anticipated on-line dates of May 24, 2001. These factors include (1) lack of available power purchase agreements, and (2) delays in processing permits by the responsible agencies.

Regarding power purchase agreements, NEO points out that no power purchase agreements are readily available at this time. NEO states that although the California Public Utilities Commission has initiated a proceeding to address procurement of renewables (R.01-10-024), a final decision in that proceeding is at least four months away. In addition, the investor-owned utilities are not entering into any advance contracts with new renewable projects pending that decision. While legislation to establish a Renewable Portfolio Standard is pending before the California legislature, it would not go into effect until after January 2003 if it passes at all. These statements are borne out by staff's knowledge of the current status of California's electricity industry.

NEO states in the Petition that the company has been seeking sales opportunities for the output from these projects by participating wherever solicitations are offered for renewables by the municipal utilities. NEO has also signed a Letter of Intent with the California Power Authority, but in the absence of contract availability and funding no new deals are being negotiated and executed by the California Power Authority.

NEO states in the Petition that the company cannot obtain firm, long-term financing until there is a signed power purchase agreement for the power. Without financing, the projects cannot begin construction, thereby delaying the on-line dates for the projects.

Regarding delays arising from permit processing, NEO states that processing of the permits for these projects has taken more than a year longer than anticipated when the projects were first proposed. NEO originally expected San Bernardino to conduct the CEQA analysis that was initiated in June 2001, and expected to receive categorical exemptions due to the small size of the projects, their location on an existing site, the fact that the methane gas from the facilities was already being flared under existing air permits, and categorical exemptions being granted to new landfill gas facilities in adjacent counties.

NEO states that San Bernardino County issued notice that it was the lead agency for CEQA on October 15, 2001, but then notified NEO on November 2, 2001 that the cities where the projects were to be located wanted to serve as lead agencies on



land use approval. NEO had to then withdraw its permit applications from the County of San Bernardino, and file new applications with the individual cities (City of Rialto, City of Colton, and City of Ontario). The City of Rialto proceeded with a categorical exemption, but the City of Colton and City of Ontario used a longer process requiring formal public vote by the authorizing review board.

NEO also states that the required permit to construct from South Coast Air Quality Management District (SCAQMD) has also taken much longer than was originally anticipated. The Permits to Construct were applied for in December 2000. SCAQMD initially had to change their regulations to accommodate the Colton and Mid-Valley Projects. They then required assurance from the engine manufacturer that SCAQMD limits on NOx emissions would be met, which was completed in May 2001. In August 2001, SCAQMD delayed the process because of an error on NEO's permit applications showing San Bernardino County as the operator of the facilities rather than NEO Corporation. When NEO informed SCAQMD of the error and asked to have it handled administratively, SCAQMD informed NEO that switching the operator from a public to a private entity required a completely new set of applications including additional public notice and additional fees. The correct approach to resolve the situation was not determined until September 2001.

NEO anticipates receiving the final permits necessary to commence construction on all three projects by June 2002, beginning construction in August 2002, and having the projects on-line by December 31, 2002.

## **B. Finding Regarding the NEO Projects**

Based on the petition, the Committee finds that the Milliken, Colton, and Mid-Valley Projects were not operational by January 1, 2002, because of circumstances beyond NEO's control. NEO's petition points out the delays resulting from the lack of power purchasers in California's electricity market as well as the delays in permitting, neither of which were circumstances within NEO's control.

First, NEO's petition clearly demonstrates that the developer has assiduously sought to secure a long-term power purchase agreement, necessary in order to obtain project financing, and has been unable to do so due to the overall uncertainty in California's electricity market over the past two years and the unavailability of long-term power contracts in the market.

Second, the CEQA process has taken much longer than was initially anticipated, in large part due to the six-month delay between NEO's initiating the CEQA process with the County of San Bernardino as lead agency, and their being notified by the County that the cities in which the projects are located wished to serve as the lead agencies. This change required each project to file new applications, with accompanying public notice periods that led to further delays. In addition, in determining the original project schedule, it was not unreasonable for NEO to have expected these projects to receive a categorical exemption in the CEQA process.

given the nature of the projects and the granting of such an exemption to similar projects in adjacent counties.

### **C. Length of Award Extension**

Based on the findings outlined above, the Committee recommends that the on-line date for purposes of the funding awards for the Milliken, Colton, and Mid-Valley Projects be extended 18 months to July 2, 2003. Although NEO expects to have these projects on-line by December 31, 2002, and seeks only a 15-month extension to March 31, 2003, the Committee believes it is reasonable to extend the on-line dates to July 2, 2003, given the uncertainty of California's electricity market and the ability of new projects to secure long-term power purchase agreements.

While Public Utilities Code section 383.5(c)(2)(B) allows for longer extensions, stating that "the date that a project begins electricity production may not extend beyond January 1, 2007," the Committee believes that extending the on-line date for the NEO projects beyond July 2, 2003 would unduly tie up program funds and be contrary to the public policy goals of the program. NOA 500-00-504 was specifically held to solicit new renewable projects that could come on-line by the summer of 2001 and assist with the State's expected energy crunch. NEO and the other participants of NOA 500-00-504 were well aware of this and should not be discouraged from coming on-line as quickly as possible.

It should also be noted that the Committee's recommended award extension is consistent with the *Guidebook*, which states, in reference to winners in the second auction whose awards are extended, that no funding award payments will be made to projects for any generation beyond July 2, 2008. Under this limitation, NEO's projects must be on-line by July 2, 2003 in order to receive five full years of funding, as is requested in the NEO petition.

### **Reduction of Funding Awards**

In accordance with the *Guidebook*, the Committee recommends that the awards for the Milliken, Colton, and Mid-Valley Projects be reduced as follows based on the projects' on-line dates.

| <b>Project On-line Date</b>      | <b>Percentage of Award</b>                  |
|----------------------------------|---|
| January 1 to September 1, 2002   | 80 Percent                                  |
| Sept. 2 to December 31, 2002     | 70 Percent                                  |
| January 1, 2003 to April 1, 2003 | 60 Percent                                  |
| April 2, 2003 to July 1, 2003    | 50 Percent                                  |
| July 2, 2003 and beyond          | Award may be further reduced or terminated. |

While the *Guidebook* and NOA 500-00-504 contain provisions for additional reductions, the Committee does not believe additional reductions are justified at this time if the projects are on-line by July 2, 2003. However, if the projects are not on-

line by July 2, 2003, or by a reasonable period of time thereafter, the Committee recommends that the Commission re-evaluate the status of the projects to determine if additional award reductions or award cancellations are justified.

# **Environmental and Energy Infrastructure and Licensing Committee Decision on Petition of Cabazon Wind Partners LLC**

## **Program Background**

Assembly Bill 1890 ([AB 1890] enacted September 23, 1996) provides \$540 million for the support of renewable electricity generation technologies. These funds are collected from the ratepayers of the state's investor-owned utilities to support existing, new, and emerging renewable electricity generation technologies.

The Renewable Energy Program was established by Senate Bill 90 ([SB 90] enacted October 12, 1997) to distribute these funds. The program consists of four separate accounts, each addressing differing needs within the renewables industry: the Existing Renewable Resources Account, the New Renewable Resources Account, the Emerging Renewable Resources Account, and the Customer-Side Renewable Resource Purchases Account.

The New Renewable Resources Account was originally allocated 30 percent of the AB 1890 funds, or \$162 million, to provide assistance to renewable electricity generating facilities that become operational after September 26, 1996. These funds are intended to foster the development of new in-state renewable electricity generation facilities and secure for the state the environmental, economic, and reliability benefits that those facilities provide. Funds in the account are awarded through periodic "auctions" in which developers of prospective renewable energy projects compete for funding in the form of production incentives paid out over a maximum of five years.

The California Energy Commission has held three such auctions to date. Detailed rules for the auctions are contained in the *Guidebook for the Renewable Energy Program, Volumes 2A and 2B – New Renewable Resources Account (Guidebook)*, available at [[www.energy.ca.gov/renewables](http://www.energy.ca.gov/renewables)]), as well as in the solicitation document for each of the three auctions, Notice of Auction (NOA) 500-97-506, NOA 500-00-504 and NOA 6-01-3.

To participate in the auctions, developers must submit bids for the amount of incentives that the developers require to compete in the broader electricity market, along with a detailed project description, schedule, and estimate of how much renewable generation the project will provide during the first five years of operation.

The first auction was held in June 1998. Eligible bids in the auction were ranked from lowest cents per kilowatt-hour incentive request to highest. Beginning with the lowest request, eligible bids were accepted until funds were fully allocated. Auction winners were notified in writing on July 10, 1998 that their projects had been accepted as eligible for funding.

According to the *Guidebook for the Renewable Energy Program - Volume 2, New Renewable Resources Account* and the NOA 500-97-506, winning projects from the first auction must come on-line (begin generating electricity) by December 31, 2001 or sooner to receive five full years of funding from the Energy Commission. This on-line date requirement is based on the version of Public Utilities Code section 383.5(c)(2)(B) existing at the time the Notice of Auction 500-97-506 was developed.

In September of 2000, Governor Davis signed Assembly Bill 995 into law, which amended section 383.5(c)(2)(B) so that projects participating in the New Renewable Resources Account could come on-line later than December 31, 2002 and still receive five full years of funding, provided that the Commission makes a formal finding that the delay in on-line date resulted from circumstances beyond a project developer's control.

At its regularly scheduled April 3, 2002 Business Meeting, the Energy Commission adopted revisions to the program guidelines to incorporate a petition process for winning project developers to follow in applying to the Commission for a funding award extension under this amendment. In summary, petitions must be sent to the Environmental and Energy Infrastructure and Licensing Committee and specify the reasons for the project's delayed on-line date, explain why the petitioner believes the delay resulted from circumstances beyond the petitioner's control, identify the reasonable efforts taken by the petitioner to bring the project on-line by the date specified in the applicable auction solicitation, identify the additional time needed to bring the project on-line and explain why this time is needed, and include a revised project schedule identifying new milestone completion dates for any milestones not passed as of the date of the petition. Within 30 days of receipt of a complete petition the Committee, in its discretion, will either issue a decision based on its consideration of the petition or schedule a hearing to consider the petition. The Committee's decision will contain recommendations regarding the appropriateness of a funding award extension, the length of extension, and any reductions or penalties to be imposed. The Committee's decision and recommendations will become final when formally approved by the Commission at a regularly scheduled Business Meeting.

### **Cabazon Wind Project**

Cabazon Wind Partners LLC ("Cabazon") was a winning bidder in the June 1998 auction (NOA 500-97-506). Cabazon was conditionally awarded \$4,977,039 (funding award agreement REN-98-046, approved by the Energy Commission in May 1999) for its 43 megawatt Cabazon Wind Project. The funding award represented a reduction of 72.3% from the project's original bid because of Rule 9 of the auction which states:

"If a bid or group of bids under consideration causes the expected total payouts to exceed the funds available, the auction will be closed by: reducing the projected generation amounts in the bids under consideration by a percentage amount that will result in the expected total payouts being equal to the funds available, giving those bidders the option of withdrawing their reduced bids from

consideration, including bids that are not withdrawn as winning bids, and closing the auction. “

Cabazon accepted the reduction of its funding award under Rule 9. Cabazon’s funding award was subsequently increased due to additional monies becoming available from the cancellations of two other winning projects from the first auction. The funds relinquished by these two projects were reallocated to Cabazon, raising their conditional funding award to \$9,367,072.52 (funding award agreement REN-98-046, Amendment 1, approved by the Energy Commission in April 2000).

At the time of the June 1998 auction, Cabazon submitted a project schedule to the Energy Commission showing that the project would be on-line before January 1, 2002, stating an on-line date of February 1, 2000. However, the project has experienced a series of delays in project development and currently reports a revised on-line date of November 1, 2002.

### **Cabazon Petition**

Cabazon submitted a formal petition (“Petition”) to the Energy Commission on May 24, 2002 asking to have the award for the Cabazon Wind Project extended pursuant to the amendment of Public Utilities Code section 383.5(c)(2)(B). The Petition requests the Energy Commission to make a determination that the project was not operational by January 1, 2002 due to “circumstances beyond the control of the developer,” and seeks a 10-month extension to the on-line date for the Cabazon Wind Project to November 1, 2002. Although Cabazon expects to have the project on-line by August 31, 2002, it is seeking an extension to November 1, 2002 to address any unexpected delays.

After reviewing the Petition and deeming it complete, the Committee determined that there was no need to hold a hearing to address the Petition and that it would exercise its discretion to issue a decision based on the Petition alone.

### **Discussion**

The discussion that follows will first address the requisite findings under California Public Utilities Code section 383.5(c)(2)(B), then the length of any funding award extensions, and lastly any appropriate reduction or penalty of the Cabazon project’s award.

#### **A. Findings Under Public Utilities Code Section 383.5(c)(2)(B)**

Under California law, a project awarded funding from the Commission’s New Renewable Resources Account remains eligible to receive five years of funding even if the project is not operational by January 1, 2002, if the Commission finds the delayed operation was due to circumstances beyond the project developer’s control. This law is set forth in Public Utilities Code section 383.5 (c)(2)(B), which provides as follows:

“Funds expended for production incentives shall be paid over a five-year period commencing on the date that a project begins electricity production, provided that the project shall be operational prior to January 1, 2002, unless the State Energy Resources Conservation and Development Commission finds that the project will not be operational prior to January 1, 2002, due to circumstances beyond the control of the developer. Upon making this finding, the State Energy Resources Conservation and Development Commission shall pay production incentives over a five-year period, commencing on the date of operation, provided that the date that a project begins electricity production may not extend beyond January 1, 2007.” [Emphasis added.]

To make the requisite finding, the Energy Commission must determine if there were circumstances beyond Cabazon’s control that prevented the project from coming on-line by January 1, 2002.

In the Petition, Cabazon points to several factors which it claims were beyond its control that delayed the project’s anticipated on-line date of February 1, 2000. These factors include (1) lawsuits challenging the project’s Wind Energy Conservation System (WECS) Permit; (2) conditions imposed by the WECS Permit for additional and unanticipated environmental review; (3) the need to negotiate a conservation easement; and (4) uncertainty surrounding the project’s contract with the California Department of Water Resources (CDWR) for the purchase of the project’s power.

Regarding the permitting issues, Cabazon states that although the project received approval of its WECS permit in December 1999, lawsuits by the Morongo Band of Mission Indians and Enron Wind (an adjacent landowner/developer) delayed the project an additional year. Further delays arose from the requirement for a 404 Permit from the US Army Corps of Engineers, which was triggered by an endangered species issue that was only identified at a late stage in the WECS permit process and which was unforeseeable at the time the original project schedule was developed and therefore beyond Cabazon’s control. In addition, the requirement for a 404 Permit was unforeseeable, since the adjacent Enron Wind project was not subject to that permit requirement.

Cabazon states that the overlapping litigation and permitting delays prevented project development from January 2000 through April 2002. Other events were occurring at the same time that contributed to the project’s delayed on-line date, although they were not independent causes of delay. The first of these was the uncertainty regarding the project’s contract with the CDWR, which was facing legal attacks in various regulatory forums. The second contributing event was the delay in Southern California Edison Company’s (SCE) processing of the project’s interconnection application arising from changes in SCE policy.

Cabazon received its final project permits and resolved the uncertainties with the power purchase contract with CDWR in April 2002, and has begun construction of the project. The project is expected to be on-line by August 31, 2002, but Cabazon is requesting its award to be extended to November 1, 2002 to allow for any unforeseen delays or problems.

## **B. Finding Regarding the Cabazon Wind Project**

Based on the Petition, the Committee finds that the Cabazon Wind Project was not operational by January 1, 2002, because of circumstances beyond Cabazon's control. Delays arising from litigation, permitting delays, and the uncertainty in California's electricity market were all circumstances beyond Cabazon's control.

Cabazon's Petition demonstrates that the developer made every effort to resolve issues that arose during the permitting process. These efforts included eliminating a number of turbines that would have required additional environmental assessment and further delayed the project; complying with Riverside County's setback requirements to avoid affecting neighboring properties; defending against challenges to the project's WECS permit; and reaching a settlement with Enron Wind that avoided years of legal appeals and consequently further delays.

In addition, it was reasonable for Cabazon not to have anticipated the requirement for the 404 Permit, since an adjacent wind project had not been subject to that requirement. Cabazon met all the requirements to satisfy the conditions imposed by the 404 Permit, but had no control over the amount of time necessary to satisfy those conditions, nor over the additional imposition of a conservation easement as a further condition of the 404 Permit.

The uncertainties surrounding contracts with the CDWR were well-known and certainly constituted a circumstance beyond Cabazon's control. The project made every effort to obtain and meet the requirements of a CDWR contract, including accepting a price reduction as a result of the project's delay past the contracted on-line date of June 1, 2002. The project faces a further 25% price reduction over the life of the contract if it is not on-line by August 31, 2002, and CDWR may elect not to purchase any power at all from turbines brought on-line after November 2002. This provides a powerful incentive for the project to come on-line by August 31, 2002, and certainly no later than November 1, 2002.

## **C. Length of Award Extension**

Based on the findings outlined above, the Committee recommends that the on-line date for purposes of the funding award for the Cabazon Wind Project be extended 10 months to November 1, 2002, but that the project not receive incentive payments for any generation after October 31, 2007. Although Cabazon expects to have this project on-line by August 31, 2002, the Committee believes it is reasonable to grant



Cabazon's request to extend the on-line date to November 1, 2002 to allow for any unforeseen construction delays.

While Public Utilities Code section 383.5(c)(2)(B) allows for longer extensions, stating that "the date that a project begins electricity production may not extend beyond January 1, 2007," the Committee believes that extending the proposed on-line date for the Cabazon Wind Project beyond November 1, 2002 would unduly tie up program funds and be contrary to the public policy goals of the program.

#### **D. Reduction of Funding Awards**

While the Guidebook, NOA 500-97-506, and Funding Award Agreement REN-98-046 all contain provisions for reductions in funding awards for auction winners for nonperformance or other reasonable cause, the Committee does not believe any award reductions for the Cabazon Wind Project are justified at this time if the project is on-line by November 1, 2002.

Cabazon has worked diligently to get its project permitted, despite numerous delays. As discussed earlier, these delays were beyond Cabazon's reasonable control. Consequently, it is questionable whether a reduction of the project's funding award can serve the purposes intended by the Commission. In addition, Cabazon's funding award was already reduced by 72.3% of its original bid under Rule 9 of the NOA 500-97-506.

Given the circumstances, the Committee recommends that the Cabazon Project not have its funding award reduced. The developer appears to have worked diligently and in good faith to get the project on-line. In addition, the Committee feels that the conditions of the award extension, coupled with the potential for significant financial penalties to be imposed by the CDWR in its power purchase contract with Cabazon, will encourage the developer to construct the project in an expeditious manner.

However, if the project is not on-line by November 1, 2002, or by a reasonable period of time thereafter, the Committee recommends that the Commission reevaluate the status of the project to determine if an award reduction or cancellation is justified.